IN THE

Supreme Court of the United States

October Term, 1925.

PERE MARQUETTE RAILWAY COMPANY,
Appellant,
v.
THE UNITED STATES,
Appellee.
No. 499.

Appeal from the Court of Claims.

BRIEF OF BENJAMIN CARTER AS *AMICUS CURIAE.*

The brief of the Government, appellee in this case, as originally printed and filed is rested mainly on the case of the *Louisville & Nashville Railroad Company*, No. 33–A at the Court of Claims; a liberal quotation being made from the opinion which accompanied a decision rendered therein on November 5, 1923. There can be no doubt that Government counsel supposed that this was the final decision and opinion in that case. In reality there were two re-hearings after this decision and on April 6, 1925, there was, in the matter here concerned, a new decision, with a conclusion of law, in favor of the claimant. This mistake being brought to the attention of Government counsel, they since have inserted in the brief a rider which merely states the change of the decision. Jus-

tice can hardly be done to the Pere Marquette case if this court does not know precisely what occurred in the Louisville & Nashville case. It is to be assumed that the facts are substantially the same in the two cases, and the Louisville & Nashville case would in truth be an authority at the Court of Claims for a decision in favor of the Pere Marquette company if its case were open there.

The basis of the cancelled opinion in the Louisville & Nashville case was in paragraph VII of the findings of fact and the conclusion of law then made, as follows:

> "Bills 5815–10 for $657.63, 5815–11 for $1,845.07, 5815–12 for $4,488.59, 5995–100 for $5,369.50 and 6127–14 for $2,487.94 were presented to a disbursing officer for payment and plaintiff was paid thereon the full sum of $14,848.63. In settlement of the disbursing officer's accounts the auditor applied the free baggage-car rule referred to in Finding V and called upon plaintiff to refund said sum of $14,848.63, which plaintiff refused to do. Thereafter, and after plaintiff's railroad had been taken over and was being operated by the United States, the auditor deducted said amount from certain several bills of the United States Railroad Administration, not otherwise involved herein. The Railroad Administration was thereupon given credit on the corporate books for said sum of $14,848.63 and a charge was set up against the United States in the various amounts deducted, aggregating said sum, said amounts being identified by the numbers of the Railroad Administration's bills from which the deductions were made. Whether such entries were made by direction of the Railroad Administration or by the railroad's representatives does not appear.
>
> "The amount which plaintiff was entitled to be paid on its said bills paid in the aggregate sum of $14,848.63 was $13,173.71.

"On the facts found the court concludes:

"1. That as to the bills referred to in Finding VII the plaintiff is not entitled to recover. * * *

The real facts, as stated in the new findings, with the conclusion of law, are as follows:

"Bills Nos. 5815–10 for $657.63, 5815–11 for $1,845.07, 5815–12 for $4,488.59, 5850–26½ for $64.07, 5995–100 for $5,369.40, and 6127–14 for $2,487.94, aggregating $14,912.70, were paid by a disbursing officer as billed by plaintiff. The remaining bills as unpaid claims were forwarded by the disbursing officer to the Auditor for the War Department for direct settlement. The total of $5,433.47 claimed on bills Nos. 5850–26½ and 5995–100 was paid directly to plaintiff prior to January 1, 1918, when the Government took control of the railroads, and the total of $9,479.23 claimed on the remaining bills was paid directly to the Director General of Railroads as plaintiff's agent during the period of such Federal control. The Auditor for the War Department took exceptions to the payments which had been made by the disbursing officer on the above bills for the reason that military impedimenta, camp equipage, etc., should have been transported free of charge on basis of one carload free for each 25 men in the movement. The disbursing officer called upon plaintiff to refund $14,848.63 on account of said sums so held to have been improperly paid, which plaintiff refused to do; and thereafter, and after plaintiff's railroad had been taken and was being operated by the United States, the auditor deducted said amount from certain several bills of the United States Railroad Administration not otherwise involved herein.

"Of said sums so deducted the plaintiff was entitled to be paid $13,173.71

"XI. Upon the institution of Federal control of railroads the Director General, under authority

vested in him by the act of Congress approved March 21, 1918 (40 Stat. 451), and in pursuance of instructions and notices issued by the War and Treasury Departments and by himself, and by agreement with plaintiff in a form prescribed by him, took into possession, beside plaintiff's physical properties, cash in hands of its station agents, and its uncollected bills for services which it had rendered to the date of commencement of said control; and thereafter said Director General, to the extent herein narrated, collected such bills as plaintiff had against the United States for transportation performed and paid such charges as were due from plaintiff to the United States.

"XII. During the Federal control of railroads the Director General, in the operation of plaintiff's lines, performed much service over said lines for the War Department, for which his bills were duly rendered. Before settlement for such services the Auditor for the War Department deducted from the bills of the Director General various sums to the aggregate amount of $14,912.70, being the amounts set out in Finding VII, held to have been wrongfully paid under the free baggage car rule. The department was given credit at the time payments were made on the Director General's books for the amount paid on his bills, and the amounts unpaid by reason of said deductions remained a charge on his books against the department. In August, 1920, a settlement for services rendered was held as between the Auditor for the War Department and the Director General of Railroads and a large sum was paid the Director General, but the disallowance of said amounts paid on plaintiff's bills as aforesaid still stood and that amount was not included in said settlement.

"XIII. In June, 1920, the plaintiff, in keeping the Director General's books of account, charged itself in the amount of $7,857.34 in account styled L. & N. Railroad Company—Federal

assets collected, on account of deductions described which had been made from bills of the Director General. In December, 1920, the plaintiff, in an account styled 'L. & N. Railroad Company—Corporate Transactions,' charged itself in the amount of $6,991.21 on account of said deductions made from bills of the Director General as recited, and in settlement subsequently had between the plaintiff and the Director General the Director General received the benefit of said charge. In a settlement had as of December 31, 1921, between the plaintiff and the Director General, relating to plaintiff's trustee account, it was found that there was due the Director General the sum of $41,910.42, which the plaintiff, on March 22, 1922, paid into said trustee account. Said sum so paid included said sum of $7,857.34.

"XIV. On March 7, 1922, plaintiff and the Director General entered into a final settlement agreement in writing, pursuant to which the Director General paid the plaintiff a lump sum of $7,000,000—'in full satisfaction and discharge of all claims, rights, and demands of every kind and character, which the said company now has or hereafter may have or claim against the Director General, or any one representing or claiming to represent the Director General, the United States, or the President, growing out of or connected with the possession, use, and operation of the company's property by the United States during the period of Federal control, or out of the contract between the parties dated the 14th day of March, 1919."

Such final settlement agreement also provided:

"The purpose and effect of this instrument is to evidence a complete and final settlement of all demands, of every kind and character as between the parties hereto, growing out of the Federal control of railroads, save and except that the follow-

ing matters are not included in this adjustment and are not affected thereby. *Exceptions:*

"1. The obligation on the part of the company as expressed in the standard form of contract between the Director General and the company, as to the conduct of litigation arising out of Federal control (except as to claims and suits of carriers against the Director General of the United States), as is stated in paragraph (*f*) of section 9 of said contract, is to continue and is not affected by this settlement.

"2. This settlement does not include nor affect any moneys or assets of the Director General turned over to the company pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made.

"3. This settlement does not include the obligations of the Director General, assumed in paragraphs (*i*) and (*j*) of section 4 of said contract, to save the company harmless as to claims, if any, of third persons, or the obligations of the Director General in respect to the payment of taxes under section 6 of the contract.

"4. This settlement does not affect nor alter any obligation executed by the company for amounts loaned, advanced, or funded by the Director General, or amounts due by reason of any equipment trust agreements, all such obligations on the part of the company to remain in full force, the same as if this agreement had not been entered into."

"*Conclusion of Law*—On the facts found the court concludes as matter of law that the plaintiff is entitled to recover the following sums: Under Finding VII, $13,173.71; under Finding VIII, $1,099.98; under Finding IX, $12,957.24; and under Finding X, $3,937.74, a total of $31,-168.67.

> "It is therefore adjudged that the plaintiff do have and recover of and from the United States the sum of thirty-one thousand one hundred sixty-eight dollars and sixty-seven cents ($31,168.67)."

Counsel for the Pere Marquete company in their brief mention the Louisville & Nashville case and the Reading case and, in reference to the Reading case alone say:

> "This case was promptly appealed, but in cases involving the same question, motions for new trial were filed and were argued and finally a number of such cases were referred to a special commissioner for the taking of additional evidence and the reporting of tentative findings of fact. Those cases were finally re-submitted to the court, October 29, 1924, on findings of fact reported to the special commissioner. January 5, 1925, the court announced its decision approving and adopting the findings of fact reported by the special commissioner, and entered judgment in each case for the plaintiff. In the following cases appeals were taken by the United States, and thereafter, at the last term, this court granted motions to advance and to consolidate for hearing with the present case: No. 401 *United States* vs. *Reading Company;* No. 402 *Reading Company* vs. *United States* (cross-appeal); No. 403 *United States* vs. *Southern Railway Company;* No. 404 *United States* vs. *St. L. B. & M. Railway Company.*"

Counsel do not say here, and could not have said, that the Louisville & Nashville case was referred to the special commissioner or that findings were adopted and a judgment entered on January 5, 1925, or that appeal was taken by the Government. None of these things happened in that case.

The Louisville & Nashville case is peculiar in the respect of the time consumed in getting the judgment

favorable to the claimant; to which fact mainly the mistake made by the Government's brief in the Pere Marquette case is to be charged. By reason of complexities in the evidence, of necessary interchange of proofs and briefs between cases and of a stubborn but unsuccessful fight made by the Government's attorney on a question of rates, the third submission of the case did not occur until after the trustee had remitted to the Treasurer of the Railroad Administration the amounts due it as reimbursement, which the carriers had paid into the trustee account. That argument resulted in the findings, judgment and opinion of April 6, 1925. These latter were made final on October 6 following, when another motion of the Government for a new trial, and a motion of the claimant for some slight amendment of the findings, were over-ruled.

The fact of the turn-over by the trustees to the Director General's Treasurer appears in the last brief of Government's counsel, filed on February 24, 1925.

The judgments in the cases of this group were rendered at different times between December, 1923, and April, 1925. Naturally, as time passed, and as the views of the Court of Claims were indicated, the narratives of fact on which the court acted when making its findings and rendering judgment were more extended and included more of detail in some of the cases than in others. But the sum of every case is this:

In the spring of 1918, under express law (40 Stat. 25 ch. 451 p.) and by standard contracts, in elaborate form the Government rented for its use the properties of the carriers, and it controlled and operated the same thereafter until February 29, 1920. In the spring of 1922, after careful scrutiny and agreement, a standard form of settlement was had under which the Government paid to the carriers the net amounts of its liabilities incurred in such

"possession, use, and operation" of the company's property by the United States during the period of Federal control.

During such Federal control the Comptroller General, on revision of paid bills of the carriers, relative to transportation performed before said take-over by the Government, reached the conclusion that there were over-payments in some of them. Separate accounts of these items were kept in forms dictated by the Government, during and after Federal control, and under requirements of the Government the carriers refunded to the Government the balances ascertained.

So the carriers, before Federal control, performed transportation for the Government to the amounts found by the Court of Claims, and they have not been paid for the same. All else is immaterial.

BENJAMIN CARTER,
Amicus Curiae.